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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

1 ALFRED T. GIULIANO, Chapter 7 Trustee of
2 the Ritz Estate, on Behalf of the Ritz Estate;
3 CPM Electronics Inc.; E.S.E. Electronics, Inc.,
4 and MFLASH, Inc.

5 On Behalf of Themselves and All Others
6 Similarly Situated,

7 Plaintiffs,

8 v.

9 SANDISK CORPORATION,
10 Defendant.

CASE NO. CV 10-02787-SBA

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DEFENDANT'S NOTICE OF
MOTION, MOTION AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF ITS
MOTION TO EXCLUDE THE
SECOND REPORT AND TESTIMONY
OF PLAINTIFFS' EXPERT DR. RYAN
SULLIVAN

Hearing Date: March 10, 2015
Time: 1:00 p.m.
Courtroom: 1, Oakland
Judge: Hon. Saundra B. Armstrong

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on March 10, 2015 at 1:00 p.m. in the courtroom of the
4 Honorable Saundra Brown Armstrong, the United States District Court for the Northern District of
5 California, located at 1301 Clay Street, Oakland, California, 94612, Defendant SanDisk
6 Corporation (“SanDisk”) will move the Court to exclude the second report and testimony of
7 Plaintiffs’ expert Dr. Ryan Sullivan.

8 This motion is made pursuant to Federal Rules of Evidence 402, 403 and 702, as well as
9 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

10 SanDisk bases its motion on this Notice of Motion and Motion, the accompanying
11 Memorandum of Points and Authorities, the [Proposed] Order, SanDisk’s Memorandum of Points
12 and Authorities and Reply Memorandum of Points and Authorities submitted in connection with its
13 pending Motion to Exclude the Report and Testimony of Dr. Sullivan offered in support of
14 Plaintiffs’ motion for class certification, any oral argument heard by the Court, the record in this
15 case, such additional evidence as may be submitted to the Court and such other matters as the
16 Court deems proper.

17 SanDisk certifies that it has complied with the Court’s meet and confer requirements and
18 that counsel for Plaintiffs have indicated that they will oppose this motion.

19 DATED: February 3, 2015 SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

20 By: _____ /s/ James P. Schaefer
21 James P. Schaefer

22 Attorneys for Defendant,
23 SANDISK CORPORATION

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TABLE OF CONTENTS

2	TABLE OF AUTHORITIES	ii
3	MEMORANDUM OF POINTS AND AUTHORITIES	1
4	PRELIMINARY STATEMENT	1
5	ARGUMENT	2
6	I. DR. SULLIVAN'S SECOND REPORT REPEATS THE FATAL FLAWS IN HIS TESTIMONY OFFERED IN SUPPORT OF CLASS CERTIFICATION	2
7	A. Because Dr. Sullivan's Regression Analysis Is Inadmissible, His Impact and Damages Opinions Should Be Excluded	2
8	B. Dr. Sullivan's 100% Pass-Through Assumptions Are Untested, Unsupported and Contrary to Economic Theory	4
9	C. Dr. Sullivan Has No Basis To Opine [REDACTED]	4
10	II. DR. SULLIVAN'S OPINIONS RELATING TO SANDISK'S ALLEGED MARKET POWER IN THE PUTATIVE FLASH CHIP MARKET SHOULD BE EXCLUDED	5
11	A. Dr. Sullivan Provides No Admissible Direct Evidence That SanDisk Had Market Power in the Putative Flash Chip Market	5
12	B. Dr. Sullivan Provides No Admissible Indirect Evidence That SanDisk Had Market Power in the Putative Flash Chip Market	6
13	III. DR. SULLIVAN'S OPINIONS RELATING TO SANDISK'S ALLEGED MARKET POWER IN ANY FLASH PRODUCT MARKET SHOULD BE EXCLUDED	12
14	A. Dr. Sullivan Provides No Admissible Direct Evidence That SanDisk Had Market Power in Any Flash Product Market	13
15	B. Dr. Sullivan Provides No Admissible Indirect Evidence That SanDisk Had Market Power in Any Flash Product Market	13
16	IV. DR. SULLIVAN'S DAMAGES CALCULATIONS SUFFER FROM ADDITIONAL FATAL FLAWS	15
17	CONCLUSION	15

TABLE OF AUTHORITIES

3		Page(s)
4	<u>CASES</u>	
5	<i>Apple, Inc. v. Samsung Electronics Co.,</i> 2012 WL 2571332 (N.D. Cal. June 30, 2012).....	5
6		
7	<i>Bailey v. Allgas, Inc.,</i> 148 F. Supp. 2d 1222 (N.D. Ala. 2000), <i>aff'd</i> , 284 F.3d 1237 (11th Cir. 2002).....	5, 10
8		
9	<i>Big Bear Lodging Ass 'n v. Snow Summit, Inc.,</i> 182 F.3d 1096 (9th Cir. 1999)	6
10		
11	<i>Chartier v. Brabender Technologie, Inc.,</i> 2011 WL 4732940 (D. Mass. Oct. 5, 2011).....	13
12		
13	<i>Church & Dwight Co. v. Mayer Laboratories, Inc.,</i> 868 F. Supp. 2d 876 (N.D. Cal. 2012), <i>rev'd in part, vacated in part on other grounds on reconsideration</i> , 2012 WL 1745592 (N.D. Cal. May 16, 2012).....	5
14		
15	<i>Concord Boat Corp. v. Brunswick Corp.,</i> 207 F.3d 1039 (8th Cir. 2000)	15
16		
17	<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.,</i> 509 U.S. 579 (1993).....	1, 2
18		
19	<i>In re Flash Memory Antitrust Litigation,</i> 2010 WL 2332081 (N.D. Cal. June 9, 2010).....	8
20		
21	<i>Image Technical Services, Inc. v. Eastman Kodak Co.,</i> 125 F.3d 1195 (9th Cir. 1997)	10
22		
23	<i>Kentucky Speedway, LLC v. National Ass 'n of Stock Car Auto Racing, Inc.,</i> 588 F.3d 908 (6th Cir. 2009)	7, 8, 14
24		
25	<i>L.A. Land Co. v. Brunswick Corp.,</i> 6 F.3d 1422 (9th Cir. 1993)	11
26		
27	<i>In re Live Concert Antitrust Litigation,</i> 863 F. Supp. 2d 966 (C.D. Cal. 2012)	7, 14
28		
29	<i>McLaughlin Equipment Co. v. Servaas,</i> 2004 WL 1629603 (S.D. Ind. Feb. 18, 2004)	9
30		
31	<i>Monsanto Co. v. Scruggs,</i> 342 F. Supp. 2d 568 (N.D. Miss. 2004), <i>aff'd</i> , 459 F.3d 1328 (Fed. Cir. 2006)	10

1	<i>Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.,</i> 924 F.2d 1484 (9th Cir. 1991)	6, 7, 9
2	<i>Pilch v. French Hospital</i> , 2000 WL 33223382 (C.D. Cal. Apr. 28, 2000).....	11
3	<i>Rebel Oil Co. v. Atlantic Richfield Co.,</i> 51 F.3d 1421 (9th Cir. 1995)	5, 6, 10, 11
4		
5	<i>Southeastern Missouri Hospital v. C.R. Bard, Inc.,</i> 642 F.3d 608 (8th Cir. 2011)	8
6		
7	<i>Townshend v. Rockwell Int'l Corp.,</i> 55 U.S.P.Q.2d 1011 (N.D. Cal. 2000)	11
8	<i>United States v. Oracle Corp.,</i> 331 F. Supp. 2d 1098 (N.D. Cal. 2004)	7
9		
10	<i>Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,</i> 382 U.S. 172 (1965).....	6
11	<u>STATUTES AND RULES</u>	
12	15 U.S.C. § 2.....	10
13	Fed. R. Evid. 402	1, 2
14	Fed. R. Evid. 403	1, 2
15	Fed. R. Evid. 702	1, 2
16	Fed. R. Evid. 702(a).....	3
17	Fed. R. Evid. 702(d).....	3
18		
19		
20		
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23		
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MEMORANDUM OF POINTS AND AUTHORITIES

2 Pursuant to Federal Rules of Evidence 402, 403 and 702, as well as *Daubert v. Merrell*
3 *Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), Defendant SanDisk Corporation (“SanDisk”)
4 submits this memorandum in support of its motion to exclude the testimony of Plaintiffs’ expert
5 Dr. Ryan Sullivan as set forth in the Second Report of Ryan Sullivan, Ph.D.

PRELIMINARY STATEMENT

Dr. Sullivan's opinions should be excluded for multiple reasons.

8 First, Dr. Sullivan has failed to remedy fatal deficiencies in his analysis that SanDisk
9 identified in connection with its pending motion to exclude his testimony offered in support of
10 Plaintiffs' motion for class certification. (See SanDisk's Motion to Exclude, Dkt. 259 ("Mot.");
11 SanDisk's Reply in Support of Motion to Exclude, Dkt. 267 ("Reply Mot.").) Most significantly,
12 Dr. Sullivan's regression model is inadmissible because it is incapable of analyzing the relationship
13 he purports to measure—i.e., a relationship [REDACTED]

15 [REDACTED]. Because Dr. Sullivan's impact and damages opinions are based on his regression
16 analysis, those opinions should be excluded for this reason alone.

17 *Second*, Dr. Sullivan's opinions relating to SanDisk's alleged market power in the putative
18 flash chip market in the United States should be excluded. Dr. Sullivan opines [REDACTED]
19 [REDACTED], but his analysis is contrary to law because he fails to address
20 whether SanDisk restricted marketwide output or charged supracompetitive prices for flash chips.

21 Dr. Sullivan also opines [REDACTED]
22 [REDACTED], but each aspect of his opinion is inadmissible. Specifically, his
23 market definition analysis should be excluded because he does not reliably employ his chosen
24 methodology: the small but significant and non-transitory increase in price (“SSNIP”) test. In
25 addition, his analysis of market concentration is contrary to law and unhelpful to the trier of fact.
26 Finally, he fails to analyze barriers to expansion, and his opinion regarding barriers to entry is
27 unsupported and does not fit the facts of the case.

28 *Third*, the opinion in Dr. Sullivan's report

1 [REDACTED] should be excluded. Dr. Sullivan's recent deposition testimony
 2 contradicts his report. Specifically, he testified [REDACTED]
 3 [REDACTED]

4 [REDACTED] Further, Dr. Sullivan's opinions relating to the alleged flash product markets
 5 should be excluded for the same reasons as his opinions regarding the putative flash chip market.

6 **Fourth**, Dr. Sullivan's damages calculations suffer from additional fatal flaws. His
 7 analysis is based on [REDACTED]

8 [REDACTED]; Dr. Sullivan fails to
 9 distinguish between [REDACTED]

10 [REDACTED] included in SanDisk's portfolio licenses with flash chip
 11 manufacturers. In addition, Dr. Sullivan continues to offer inadmissible opinions regarding
 12 damages pre-dating the Class Period (beginning on June 25, 2006) and damages based on
 13 prejudgment interest.

14 **ARGUMENT**

15 The admissibility of expert testimony is governed by Federal Rule of Evidence 702 and
 16 *Daubert*. (Mot. at 2-3.) The proponent of expert testimony must establish by a preponderance of
 17 the evidence that the testimony is reliable and fits the facts of the case. (*Id.* at 3.) To be
 18 admissible, expert testimony also must be relevant, and its probative value may not be substantially
 19 outweighed by a danger of confusing the issues or misleading the jury. *See* Fed. R. Evid. 402, 403.

20 **I. DR. SULLIVAN'S SECOND REPORT REPEATS THE FATAL FLAWS IN HIS
 21 TESTIMONY OFFERED IN SUPPORT OF CLASS CERTIFICATION**

22 **A. Because Dr. Sullivan's Regression Analysis Is Inadmissible, His Impact and
 23 Damages Opinions Should Be Excluded**

24 Dr. Sullivan's opinions regarding impact and damages are based on his regression analysis.
 25 (*See, e.g.*, Declaration of Ian Chen In Support of SanDisk's Motion for Summary Judgment and
 26 Motion to Exclude the Second Report and Testimony of Plaintiffs' Expert Dr. Sullivan ("Chen
 27 Decl.") at Ex. 27 ("Sullivan 2d Rep.") ¶¶ 19(c)-(d), 122-32, 135-38.) Dr. Sullivan claims that his
 28 regression model measures [REDACTED] (id. ¶ 123) and that it purportedly establishes [REDACTED]

1

[REDACTED] (Id. ¶ 129.)

2

As explained in connection with SanDisk's pending motion to exclude Dr. Sullivan's class certification opinions, his regression analysis is inadmissible because it is incapable of measuring

4

[REDACTED] (Mot. at

5

12-13; Reply Mot. at 1-3.) Dr. Sullivan's model includes

6

7

[REDACTED] but *it is undisputed* that excluding [REDACTED]—or

8

replacing it with a value equal to 1—*has no impact* on his results. (Reply Mot. at 1-2; Chen. Decl. at Ex. 33 ("Keeley 2d Rep.") ¶¶ 26-27.)

10

11

This fatal flaw in Dr. Sullivan's methodology is attributable to a well-recognized error

12

known as "perfect collinearity." [REDACTED]

13

14

15

16

17

18

[REDACTED]

19

[REDACTED]

20

Thus, Dr. Sullivan's regression analysis should be excluded because he has not "reliably

21

applied [his] principles and methods to the facts of the case" Fed. R. Evid. 702(d), and the results

22

cannot assist the trier of fact. *See* Fed. R. Evid. 702(a). (*See also* Mot. at 13.) Further, because Dr.

23

¹ Dr. Sullivan contends that [REDACTED]

24

[REDACTED] (Sullivan 2d Rep. at 71 n.312.) But that is precisely the point; Dr. Keeley has established perfect collinearity by demonstrating that [REDACTED]

(Keeley 2d Rep. ¶ 27.)

25

² Dr. Sullivan argues that [REDACTED]

26

[REDACTED] (Sullivan 2d Rep. at 70 n.310.) But the fact that SanDisk charged more for higher capacity products lends no support to Plaintiffs' theory—i.e.,

27

[REDACTED]. (Keeley 2d Rep. ¶ 26.)

28

1 Sullivan's regression model is the basis for his impact and damages opinions, those opinions
 2 should be excluded as well.

3 **B. Dr. Sullivan's 100% Pass-Through Assumptions Are Untested, Unsupported**
 4 **and Contrary to Economic Theory**

5 Dr. Sullivan's impact and damages opinions are based on assumptions [REDACTED]
 6 [REDACTED]

7 (Reply Mot. at 3-4.) Dr. Sullivan now acknowledges that [REDACTED]
 8 [REDACTED]

9 [REDACTED] (Chen. Decl. at Ex. 28 ("Sullivan Tr.") at 384-85; *see also* *id.* at 343.)

10 As explained in connection with SanDisk's pending motion, Dr. Sullivan's assumptions are
 11 unreliable because they are untested and unsupported by empirical analysis. (Mot. at 9-11; Reply
 12 Mot. at 3-5.) For example, Dr. Sullivan's assumptions are unsupported by analysis of any SanDisk
 13 flash chip licensee's cost or pricing data, nor is there testimony or documentary evidence indicating
 14 that SanDisk's flash chip licensees considered royalty payments to SanDisk when setting prices.

15 (Reply Mot. at 4.) In addition, Dr. Sullivan's assumption [REDACTED]

16 [REDACTED] is contrary to well-established economic theory demonstrating
 17 that only royalties affecting marginal costs impact pricing decisions. (Mot. at 10; *see also* Keeley
 18 2d Rep. ¶ 32.) Moreover, Dr. Sullivan [REDACTED], which
 19 did not pay royalties to SanDisk after 2001, and assumes without basis [REDACTED]

20 [REDACTED] (Reply Mot. at 4; *see also* Keeley 2d Rep. ¶ 33.)

21 **C. Dr. Sullivan Has No Basis To Opine** [REDACTED]

23 Dr. Sullivan opines that [REDACTED]
 24 [REDACTED]

25 . For example, Dr. Sullivan testified that [REDACTED]
 26 [REDACTED]

27 [REDACTED] (Sullivan Tr. at 215; *see also* Mot. at 8-9.)

28 Dr. Sullivan's testimony should be excluded because he impermissibly opines on the

1 parties' intent underlying their license agreements. (Mot. at 8; Reply Mot. at 9.) In addition, Dr.
 2 Sullivan's opinion is unreliable because it lacks adequate factual basis. Dr. Sullivan did not
 3 analyze whether [REDACTED]
 4 [REDACTED]

5 [REDACTED] (Sullivan Tr. at 71-72, 176, 211-12.)

6 **II. DR. SULLIVAN'S OPINIONS RELATING TO SANDISK'S ALLEGED MARKET**
POWER IN THE PUTATIVE FLASH CHIP MARKET SHOULD BE EXCLUDED

7
 8 Dr. Sullivan's opinions that [REDACTED]

9 [REDACTED] should be excluded on multiple grounds.

10 **A. Dr. Sullivan Provides No Admissible Direct Evidence That SanDisk Had**
Market Power in the Putative Flash Chip Market

11
 12 To establish market power through direct evidence, Plaintiffs must prove both (i) restricted
 13 output and (ii) supracompetitive pricing. *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421,
 14 1434 (9th Cir. 1995). Proof of restricted output requires evidence that the defendant "restrict[ed]
 15 its own, and hence the market's, output." *Church & Dwight Co. v. Mayer Labs., Inc.*, 868 F. Supp.
 16 2d 876, 896 (N.D. Cal. 2012), *rev'd in part, vacated in part on other grounds on reconsideration*,
 17 2012 WL 1745592 (N.D. Cal. May 16, 2012). Proof of supracompetitive prices requires a
 18 comparison between the defendant's prices and margins relative to those of its rivals. *See id.* at
 19 897 (holding Mayer failed to provide evidence of supracompetitive pricing by C&D, where Mayer
 20 did "not provide evidence as to its own or other rivals' comparative margins" and Mayer's prices
 21 were "even higher" than C&D's).

22 Dr. Sullivan's direct evidence analysis should be excluded as unreliable and unhelpful to
 23 the trier of fact because it is contrary to law. *See, e.g., Apple, Inc. v. Samsung Elecs. Co.*, 2012 WL
 24 2571332, at *6 (N.D. Cal. June 30, 2012) (excluding expert damages opinion that was "contrary to
 25 law"); *Bailey v. Allgas, Inc.*, 148 F. Supp. 2d 1222, 1245-46 (N.D. Ala. 2000) (expert economist's
 26 market power opinion was "contrary to law" and, therefore, unreliable and unhelpful to the trier of
 27 fact, where expert failed to analyze whether defendant charged supracompetitive prices or excluded
 28 competitors), *aff'd*, 284 F.3d 1237 (11th Cir. 2002).

1 Dr. Sullivan opines that [REDACTED]

2 [REDACTED] (Sullivan

3 2d Rep. ¶ 42.) But Dr. Sullivan fails—as required by law—to analyze whether SanDisk restricted
 4 marketwide output of flash chips or charged supracompetitive prices for its flash chips. In fact, his
 5 direct evidence opinion is not based on *any analysis* of flash chip output or pricing. (See
 6 *id.* ¶ 42(a)-(i).) Further, the data presented elsewhere in Dr. Sullivan’s report illustrates that

7 [REDACTED] (Id. Atts. I-3, I-4; *see also* Keeley 2d Rep. ¶ 50 & Ex. 3.)

8 [REDACTED] Dr. Sullivan provides no analysis establishing that flash chip output would have been even higher,
 9 or flash chip prices even lower, but for the alleged misconduct.³

10

11 **B. Dr. Sullivan Provides No Admissible Indirect Evidence That SanDisk Had**
Market Power in the Putative Flash Chip Market

12

13 To prove market power through indirect evidence, “a plaintiff must: (1) define the relevant
 14 market, (2) show that the defendant owns a dominant share of that market, and (3) show that there
 15 are significant barriers to entry and show that existing competitors lack the capacity to increase
 16 their output in the short run.” *Rebel Oil*, 51 F.3d at 1434.

17 Dr. Sullivan offers opinions relating to the definition of the alleged flash chip market,
 18 market concentration and barriers to entry. Each of these opinions should be excluded.

19

20 1. Dr. Sullivan’s Opinions Regarding the Putative Flash Chip Market in the
United States Should Be Excluded

21

22 “Monopolization claims can only be evaluated with reference to properly defined
 23 geographic and product markets.” *Big Bear Lodging Ass’n v. Snow Summit, Inc.*, 182 F.3d 1096,
 24 1104 (9th Cir. 1999). “The product market includes the pool of goods or services that enjoy
 25 reasonable interchangeability of use and cross-elasticity of demand.” *Morgan, Strand, Wheeler &*
Biggs v. Radiology, Ltd., 924 F.2d 1484, 1489 (9th Cir. 1991) (citation omitted). “A geographic

26

27

28

³ Dr. Sullivan’s failure to properly define a relevant market for flash chips (*see infra* pp. 7-9) also
 renders his market power opinion inadmissible. *See Walker Process Equip., Inc. v. Food Mach. &*
Chem. Corp., 382 U.S. 172, 177 (1965) (“Without a definition of th[e] market there is no way to
 measure [the defendant’s] ability to lessen or destroy competition.”). (*See also* Mot. at 4-5 & n.3.)

1 market is ““an area of effective competition’ . . . where buyers can turn for alternative sources of
 2 supply.”” *Id.* at 1490 (ellipsis in original; citations omitted).

3 Dr. Sullivan opines [REDACTED]

(Sullivan 2d

4 Rep. ¶ 49) and [REDACTED]

5 [REDACTED] (*Id.* ¶ 66.) Because Dr. Sullivan’s analyses of both the product and geographic
 6 markets are fatally defective, his market definition opinions should be excluded.

7 (a) Dr. Sullivan’s Product Market Definition Opinion Is Inadmissible

8 Dr. Sullivan’s opinion [REDACTED] is based on
 9 his purported application of the SSNIP test outlined in the Horizontal Merger Guidelines used by
 10 the Department of Justice and the Federal Trade Commission. (Sullivan 2d Rep. ¶¶ 49, 51-53.)

11 While the SSNIP test is a recognized methodology,⁴ Dr. Sullivan did not perform the proper
 12 analysis. As a result, his market definition opinion is unreliable and should be excluded. *See, e.g.,*
 13 *Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 918-19 (6th Cir.
 14 2009) (affirming exclusion of market definition opinion because expert did not properly perform
 15 SSNIP test); *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 988-89 (C.D. Cal. 2012)
 16 (expert’s “failure to analyze, in a meaningful way, the possibility of a narrower or broader product
 17 market render[ed] his purported application of the SSNIP methodology unreliable under Rule
 18 702(d)”).

19 Here, Dr. Sullivan did not reliably apply the SSNIP methodology. Rather, he [REDACTED]

20 [REDACTED]

21 ⁴ The SSNIP test analysis was outlined in *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098
 22 (N.D. Cal. 2004):

23 Starting with the smallest possible group of competing products, the [1997 Horizontal
 24 Merger] Guidelines then ask “whether ‘a hypothetical monopolist over that group of
 25 products would profitably impose at least a “small but significant and nontransitory” [price] [REDACTED]
 26 increase [“(SSNIP)”), “generally deemed to be about five percent lasting for the
 27 foreseeable future. If a significant number of customers respond to a SSNIP by purchasing
 28 substitute products having “a very considerable degree of functional interchangeability” for
 the monopolist’s products, then the SSNIP would not be profitable. Accordingly, the
 product market must be expanded to encompass those substitute products that constrain the
 monopolist’s pricing. The product market is expanded until the hypothetical monopolist
 could profitably impose a SSNIP.

Id. at 1111-12 (alterations in original; citations omitted).

1 [REDACTED] (Sullivan 2d Rep. ¶¶ 51-52),
2 but that [REDACTED] (Id. ¶ 53.) Dr.

3 Sullivan failed to employ the iterative approach called for under the SSNIP test, which requires
 4 adding one product at a time until the market is large enough that a hypothetical monopolist could
 5 impose a SSNIP. (Keeley 2d Rep. ¶ 79.) For example, Dr. Sullivan did not evaluate whether a
 6 hypothetical monopolist of multiple—but not all—[REDACTED] could impose a SSNIP. He
 7 also failed to perform SSNIP tests based on other differences in flash chip characteristics, such as
 8 data transfer speed, size or endurance.⁵ Moreover, Dr. Sullivan’s conclusions regarding the
 9 outcome of his SSNIP tests are pure conjecture that are unsupported by any empirical analysis; he
 10 did not analyze any market data, such as pricing or output. *See Se. Mo. Hosp. v. C.R. Bard, Inc.*,
 11 642 F.3d 608, 616 (8th Cir. 2011) (rejecting SSNIP analysis because expert “offer[ed] no market
 12 studies to support [his] claim” that customers would not substitute products in response to SSNIP).

13 The record evidence that Dr. Sullivan failed to consider suggests that the alleged market for
 14 all flash chips is both overly broad and under-inclusive. As Dr. Keeley points out, Dr. Sullivan’s
 15 own [REDACTED]—which Dr. Sullivan disregarded when considering the relevant product
 16 market—[REDACTED] which indicates that [REDACTED]
 17 [REDACTED]. (Keeley 2d

18 Rep. ¶ 75 & Ex. 10 (citing Sullivan 2d Rep. Att. M-6).) In addition, Dr. Sullivan dismissed
 19 evidence [REDACTED]

20 [REDACTED] (Id.) Dr. Sullivan’s failure [REDACTED]

21 [REDACTED] renders his market definition opinion unreliable. *See, e.g., Ky. Speedway*, 588 F.3d at
 22 917-18 (affirming exclusion of market definition opinion where expert “inadequately examined
 23 possible substitutes”).

24 (b) Dr. Sullivan’s Geographic Market Definition Opinion Is Inadmissible
 25 Dr. Sullivan’s opinion [REDACTED]

26 ⁵ As this Court has recognized, “[f]lash chips vary in terms of: (1) density (capacity); (2) speed; (3)
 27 size; (4) power consumption and voltage requirements; (5) reliability; (6) package type; and (7)
 28 endurance (the number of times memory can be erased and rewritten).” *In re Flash Memory*
Antitrust Litig., 2010 WL 2332081, at *1 (N.D. Cal. June 9, 2010).

1 [REDACTED] should be excluded for two reasons.

2 *First*, Dr. Sullivan again fails to properly apply the SSNIP methodology on which he
 3 purportedly relies. Dr. Sullivan states [REDACTED]

4 [REDACTED]
 5 [REDACTED]
 6 (Sullivan 2d Rep. ¶ 67.) But Dr. Sullivan's assertions again
 7 are purely conclusory. He cites no evidence of [REDACTED]
 8 [REDACTED] during the Class Period.⁶ More importantly, he does not test [REDACTED]
 9 [REDACTED] could impose a SSNIP.

10 *Second*, Dr. Sullivan does not evaluate the “““area of effective competition’ . . . where
 11 buyers can turn for alternative sources of supply,”” as required by law. *See Morgan, Strand*, 924
 12 F.2d at 1490 (ellipsis in original; citations omitted). Dr. Sullivan simply fails to analyze whether a
 13 [REDACTED]

14 This failure is particularly glaring, given that Dr. Sullivan acknowledges [REDACTED]
 15 [REDACTED] (Sullivan 2d Rep. ¶ 67) and uses [REDACTED]
 16 [REDACTED] (*Id.* ¶ 73 & Atts. I-5, I-6.) Indeed, the flash chips that SanDisk
 17 sold during the Class Period [REDACTED] (Keeley 2d Rep. ¶ 76.)
 18 Dr. Sullivan's failure to analyze where customers would look to purchase flash chips renders his
 19 opinion inadmissible. *See, e.g., McLaughlin Equip. Co. v. Servaas*, 2004 WL 1629603, at *8 (S.D.
 20 Ind. Feb. 18, 2004) (excluding geographic market opinion because expert failed to analyze where
 21 customers would look to purchase the relevant product).

22 2. Dr. Sullivan's Market Concentration Analysis Is Contrary to Law and
 23 Unhelpful to the Trier of Fact

24 Dr. Sullivan analyzes flash chip market concentration pursuant to the Herfindahl-
 25 Hirschman Index (“HHI”), which [REDACTED]
 26 [REDACTED] (Sullivan 2d Rep. ¶ 71.) Based on his conclusion [REDACTED]

27 ⁶ Dr. Sullivan also ignores that SanDisk generally licensed its patents on a worldwide—not U.S.-
 28 only—basis. (Keeley 2d Rep. ¶ 76.)

1 [REDACTED], he
 2 calculates [REDACTED] flash chip HHIs during this period. (*Id.* ¶ 73 & Att. I-5.) Dr. Sullivan
 3 acknowledges [REDACTED]
 4 (*id.* ¶ 75), and

5 [REDACTED] (*Id.* Att. I-5.) He concludes that [REDACTED]
 6 [REDACTED] (Sullivan Tr. at 412-14.)

7 Dr. Sullivan's market concentration opinion should be excluded for two independent
 8 reasons. *First*, his analysis is contrary to law. "Courts generally require a 65% market share to
 9 establish a *prima facie* case of market power." *Image Technical Servs., Inc. v. Eastman Kodak Co.*,
 10 125 F.3d 1195, 1206 (9th Cir. 1997); *see also Rebel Oil*, 51 F.3d at 1438 ("[N]umerous cases hold
 11 that a market share of less than 50 percent is presumptively insufficient to establish market
 12 power.").

13 [REDACTED] should be excluded as contrary to law. *See*,
 14 *e.g.*, *Bailey*, 148 F. Supp. 2d at 1245-46.⁷

15 *Second*, Dr. Sullivan's HHI calculations are unhelpful to the trier of fact. His calculations
 16 [REDACTED] which is inconsistent with his opinion that the relevant
 17 geographic market for flash chips [REDACTED] (Sullivan 2d Rep. ¶ 66.)

18 Further, HHI calculations are irrelevant in the context of this litigation brought under Section 2 of
 19 the Sherman Act, 15 U.S.C. § 2. "An HHI analysis . . . is utilized to determine before and after
 20 market concentrations when considering whether proposed mergers will be presumptively
 21 anticompetitive. [It is] irrelevant in this case [brought under Section 2], in which no merger is
 22 contemplated and only market share is at issue." *Pilch v. French Hosp.*, 2000 WL 33223382, at *7

23
 24 ⁷ To the extent Dr. Sullivan suggests that SanDisk's share of any market can be aggregated with its
 25 licensees' to evaluate market power, such an approach is contrary to law. *See Monsanto Co. v.*
26 Scruggs, 342 F. Supp. 2d 568, 583 (N.D. Miss. 2004) (rejecting experts' arguments that
 27 "assume[d] the propriety of including the market shares of Monsanto's seed partners in
 determining Monsanto's share of the relevant market" because "[n]o [i]legal precedent supports
 such a remarkable position. Monsanto's market share must be determined solely on the quantity of
 goods and/or services Monsanto sold to customers."), *aff'd*, 459 F.3d 1328 (Fed. Cir. 2006). *See*
also Rebel Oil, 51 F.3d at 1443 ("To pose a threat of monopolization, one firm *alone* must have the
 power to control market output and exclude competition.").

1 n.12 (C.D. Cal. Apr. 28, 2000).

2 3. Dr. Sullivan Fails to Analyze Whether There Were Barriers to Expansion in
 3 the Flash Chip Market, and His Opinion That There Were Significant
Barriers to Entry Is Unsupported and Does Not Fit the Facts

4 To establish market power through indirect evidence, Plaintiffs also must prove the
 5 existence of both barriers to expansion and barriers to entry. *See Rebel Oil*, 51 F.3d at 1434.
 6 Barriers to expansion prevent firms from increasing output in the short run. *See id.* Barriers to
 7 entry are “either ‘additional long-run costs that were not incurred by incumbent firms but must be
 8 incurred by new entrants,’ or ‘factors in the market that deter entry while permitting incumbent
 9 firms to earn monopoly returns.’” *L.A. Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1427 (9th Cir.
 10 1993) (citation omitted).

11 As an initial matter, Dr. Sullivan offers no opinion or analysis regarding barriers to
 12 expansion in the putative flash chip market. This failure alone renders his opinion contrary to law
 13 because proof of barriers to expansion is required to establish market power through indirect
 14 evidence. *See, e.g., Townshend v. Rockwell Int'l Corp.*, 55 U.S.P.Q.2d 1011, 1021 (N.D. Cal.
 15 2000) (Armstrong, J.) (dismissing Section 2 counterclaim because counterclaimant “has not alleged
 16 facts to show that competitors are unable to expand output”).

17 With regard to barriers to entry, Dr. Sullivan’s opinion should be excluded because it is
 18 unsupported by any analysis and does not fit the facts of the case. Dr. Sullivan opines

19 20 21 (Sullivan 2d Rep. ¶ 80.) Even though Dr. Sullivan defines

22 23 24 25 26 27 28 (id. ¶ 79 (citation omitted)), he conducts no analysis to determine whether a new
 entrant had to incur higher costs than an incumbent firm did to enter the putative flash chip market.
 For example, Dr. Sullivan does not evaluate whether a new entrant would have been required to
 spend more on research and development than SanDisk.

In addition, Dr. Sullivan’s opinion

does not fit the facts of the case because the record provides ample evidence of

1 entry into the alleged flash chip market. Indeed, Dr. Sullivan's own data
2 [REDACTED]

3 (Sullivan 2d Rep. Att. I-5; *see also* Keeley 2d Rep. ¶ 51 & Ex. 3.)
4 [REDACTED]

5 (Id.)
6 [REDACTED]

7 [REDACTED] (Id.) Dr. Sullivan does not even
8 attempt to explain how the emergence of new entrants is consistent with
9 [REDACTED]

10 **III. DR. SULLIVAN'S OPINIONS RELATING TO SANDISK'S ALLEGED MARKET**
POWER IN ANY FLASH PRODUCT MARKET SHOULD BE EXCLUDED

11
12 In his report, Dr. Sullivan opines [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 (Sullivan 2d Rep. ¶ 65; *see also* id. ¶ 78
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 But Dr. Sullivan contradicted this opinion at his deposition. Specifically, he testified that
20 [REDACTED]
21 [REDACTED]

22 (Sullivan Tr. at 377; *see also* id. at 378
23 [REDACTED] Significantly, Dr. Sullivan testified that
24 [REDACTED]

25 (See id. at 393, 418-19.)
26 [REDACTED]

27 In light of Dr. Sullivan's deposition testimony, the opinion in his report that
28 [REDACTED]

29 should be excluded. *See Chartier v. Brabender Technologie, Inc.*, 2011 WL 4732940, at *7-8 (D.

1 Mass. Oct. 5, 2011) (excluding statements in expert report “that were directly contradicted by
 2 [expert]’s later deposition testimony” and noting that “[t]he purpose behind expert disclosures, and
 3 particularly expert depositions, would be defeated if an expert were permitted to give varying
 4 versions of his opinion, leaving the opponent to guess at which version will be rendered at trial”).
 5 Further, Dr. Sullivan’s opinions relating to the flash product markets should be excluded for
 6 multiple additional reasons.

7 **A. Dr. Sullivan Provides No Admissible Direct Evidence That SanDisk Had**
8 Market Power in Any Flash Product Market

9 Dr. Sullivan presents no admissible evidence to support an opinion that SanDisk had market
 10 power in any flash product market. While Dr. Sullivan claims that his regression model
 11 [REDACTED] (Sullivan 2d Rep. ¶

12 43(c)), that model is inadmissible. (*See supra* pp. 2-3.) Even ignoring the regression model’s fatal
 13 flaws, Dr. Sullivan’s analysis still cannot provide evidence of restricted marketwide output and
 14 supracompetitive prices for any flash product. The model does not show that SanDisk restricted its
 15 own output, let alone marketwide output for any flash product. In addition, the model cannot
 16 establish supracompetitive pricing because it does not analyze SanDisk’s margins or the prices or
 17 margins of any SanDisk competitor.

18 **B. Dr. Sullivan Provides No Admissible Indirect Evidence That SanDisk Had**
19 Market Power in Any Flash Product Market

20 Dr. Sullivan’s opinions regarding the putative flash product markets suffer from the same
 21 fatal defects as his opinions relating to the alleged flash chip market.

22 First, Dr. Sullivan did not reliably apply the SSNIP analysis to define the relevant product
 23 markets. Like his flash chip market analysis (*see supra* pp. 7-9), Dr. Sullivan failed to employ the
 24 iterative approach required under the SSNIP test and performed no empirical analysis to support
 25 his assertions that a SSNIP could or could not be imposed. For example, he opines [REDACTED]

26 [REDACTED]
 27 [REDACTED] (Sullivan 2d Rep. ¶ 60(b)), even though he did not test whether customers
 28 would substitute among these products in response to a SSNIP. In fact, the record indicates that

1 [REDACTED] are not all interchangeable and, therefore, they do not occupy the same product
 2 market. (See Keeley 2d Rep. ¶ 82; Chen. Decl. at Ex. 41 ("Dimont Tr.") at 21-23 ([REDACTED]
 3 [REDACTED]).)⁸

4 Dr. Sullivan also did not adequately test whether flash product customers would substitute
 5 [REDACTED]. For example, elsewhere in his report, Dr. Sullivan references [REDACTED]
 6 [REDACTED] (Sullivan 2d Rep. ¶ 53(c)(iv)
 7 & n.113.) But Dr. Sullivan did not test whether customers would switch between these products in
 8 the event of SSNIP, nor did he conduct any other analysis of substitution between them. This
 9 failure to consider potential substitutes again warrants exclusion of Dr. Sullivan's product market
 10 analysis. *See, e.g., Ky. Speedway*, 588 F.3d at 917-18.

11 *Second*, Dr. Sullivan has no basis to support his opinion [REDACTED]
 12 [REDACTED] (Sullivan 2d Rep. ¶ 68.) He did not analyze whether
 13 a hypothetical [REDACTED] of any flash product could impose a SSNIP, nor did he consider
 14 where customers look to source flash products. And, once again, he ignored evidence that major
 15 flash product manufacturers that sell [REDACTED]—including SanDisk—manufacture
 16 their products [REDACTED]. (Keeley 2d Rep. ¶ 76.)

17 *Third*, Dr. Sullivan's analyses of market concentration for the flash products are contrary to
 18 law and unhelpful to the trier of fact. SanDisk's shares of the putative flash product markets were
 19 [REDACTED]. (See Sullivan 2d Rep. Att. I.
 20 7.) And Dr. Sullivan's analysis of [REDACTED] HHIs again is inconsistent with his putative market
 21 definitions and irrelevant in the context of a Section 2 litigation. (See *supra* p. 10.)

22 *Fourth*, Dr. Sullivan offers no analysis of barriers to expansion in the putative flash product
 23 markets, nor does he offer any support for his conclusion [REDACTED]
 24 [REDACTED] (See Sullivan 2d Rep. ¶ 81.) Once again, his opinions regarding barriers

25
 26 ⁸ Dr. Sullivan argues [REDACTED] (Sullivan 2d Rep. ¶ 63.) But those materials do not analyze "markets" from an
 27 antitrust perspective. Further, analysis of industry recognition does not itself provide a reliable
 28 basis to opine regarding market definition. *See Live Concert*, 863 F. Supp. 2d at 993 (excluding
 market definition analysis "almost entirely" focused on "industry/public recognition").

1 to entry do not fit the facts of the case. As Dr. Keeley points out, multiple firms entered and
 2 expanded in the alleged flash product markets during the Class Period. (Keeley 2d Rep. ¶¶ 65-70.)

3 **IV. DR. SULLIVAN'S DAMAGES CALCULATIONS SUFFER FROM ADDITIONAL
 FATAL FLAWS**

5 Even ignoring the above-described fatal flaws in Dr. Sullivan's regression model and his
 6 underlying assumptions (*see supra* pp. 2-5), there are additional grounds that warrant exclusion of
 7 Dr. Sullivan's damages calculations.

8 *First*, Dr. Sullivan's damages calculations should be excluded because [REDACTED]

9 [REDACTED]
 10 [REDACTED]. Courts routinely exclude damages models when the
 11 expert fails to distinguish between harm caused by alleged misconduct and harm flowing from
 12 lawful activity. *See, e.g., Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir.
 13 2000) (expert's damages model "should not have been admitted . . . because it did not separate
 14 lawful from unlawful conduct").

15 Here, the starting point of Dr. Sullivan's damages analysis is [REDACTED]

16 [REDACTED] (Sullivan
 17 2d Rep. Att. K-11.) But it is undisputed that [REDACTED]

18 [REDACTED]
 19 [REDACTED]
 20 (Sullivan Tr. at 284-86.) Dr. Sullivan's failure to distinguish between [REDACTED]
 21 [REDACTED] renders his damages calculation fatally flawed and
 22 inadmissible.

23 *Second*, Dr. Sullivan still opines on (i) damages pre-dating the Class Period beginning on
 24 June 25, 2006 and (ii) prejudgment interest. (Sullivan 2d Rep. ¶ 19(e), 132-34.) These opinions
 25 should be excluded as unhelpful to the trier of fact and contrary to law. (Mot. at 15.)

26 **CONCLUSION**

27 For the foregoing reasons, SanDisk respectfully requests that the Court exclude Dr.
 28 Sullivan's opinions and testimony set forth in his second report.

1 DATED: February 3, 2015

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2 By: /s/ James P. Schaefer
3 James P. Schaefer

4 Attorneys for Defendant,
5 SANDISK CORPORATION

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